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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND THE ARIZONA)	
RULES OF CIVIL APPELLATE)	Supreme Court No. R-14-0017
PROCEDURE)	
)	Reply Regarding
)	the Amended Petition
)	
_____)	

Petitioner files this Reply consistent with the Court’s prior order authorizing a modified comment period.

Appendices to this Reply. Attached to this Reply are Appendices A and B, which contain Petitioner’s final set of proposed amendments to the Arizona Rules of Civil Appellate Procedure (“ARCAP”). Appendix A is a “mark-up” version of Appendix 2 to the May 20 Amended Petition; it shows revisions to the proposed rules that were made after the May 20 filing date. Appendix B is a “clean” version of Appendix A. Appendix B to this Reply supersedes Appendix 2 to the Amended Petition.

Introduction. A single, formal comment was filed in R-14-0017 during the first comment period, and only one formal comment was filed during the second

comment period, which ended on June 13, 2014. However, Petitioner has received a large volume of informal comments from appellate judges, appellate clerks and staff attorneys, appellate practitioners in the public and private sectors, the State Bar, and members of the superior court. The informal vetting process during the first comment period was quite robust, and it continued, albeit at a slower pace, during the second comment period. Many of the changes shown in the attached version reflect these recent informal comments.

The Most Recent Revisions. In the interval between the filing of the Amended Petition and this Reply, Petitioner has incorporated dozens of improvements into the proposed set of rules. These changes are shown in yellow highlight in Appendix A, and range from very minor (such as revisions to a word, phrase, or punctuation mark) to more extensive “wordsmithing.”

Here are examples of stylistic revisions:

- Purpose: Remove unnecessary verbiage:

Rule	May 20 version	July 7 version
10(h)	Electronic Filing and Service Requirement. Parties to an expedited election appeal are required to file documents electronically, as provided by Rule 4.2, unless the party has an exception allowing the filing of a paper document under Rule 4.1.	Electronic Filing and Service Requirement. Parties to an expedited election appeal are required to file documents electronically, as provided by Rule 4.2, unless an exception <u>applies</u> under Rule 4.1.
13.1(d)	Appendix Filed Electronically. A party that files a brief electronically	Appendix Filed Electronically. A party that files a brief electronically

	may file a separate appendix or may file a combined brief and appendix as a single document, with the appendix following the brief. A combined filing may not exceed the size limits of the filing portal.	may file a separate appendix or may file a combined brief and appendix as a single document, with the appendix following the brief.
22(c)	Timing. A party desiring reconsideration of a decision must file a motion for reconsideration in the appellate court within 15 days after the appellate court enters its decision. A motion to extend this deadline must be filed in the appellate court that issued the decision. A party may amend a motion for reconsideration only with the appellate court's permission.	Timing. A party desiring reconsideration of a decision must file a motion for reconsideration in the appellate court within 15 days after the appellate court enters its decision. A party may amend a motion for reconsideration only with the appellate court's permission.

- Purpose: Make provisions clearer:

Rule	May 20 version	July 7 version
21(c)	If the Court of Appeals awards attorneys' fees or costs after the filing of a petition for review, a party that timely objected to the statement may file with the Supreme Court within 10 days of entry of the award a motion to review the party's objections to the award when considering the petition. The motion must include a copy of the order of the Court of Appeals granting fees or costs.	If the Court of Appeals awards attorneys' fees or costs after the filing of a petition for review, a party that timely objected to the statement may file <u>a motion</u> with the Supreme Court <u>requesting</u> review <u>of</u> the party's objections to the award when considering the petition. The motion must <u>be filed with 10 days after entry of the award, and must</u> include a copy of the order of the Court of Appeals granting fees or costs.

- Purpose: Add descriptive subheadings:

Rule	May 20 version	July 7 version
23(c)	Stay Pending Motion for Reconsideration. A petition for review is automatically stayed if the petition is filed before the Court of Appeals decides a timely filed motion for reconsideration. The stay remains in effect until the Court of	Stay Pending Motion for Reconsideration. (1) Generally. A petition for review is automatically stayed if the petition is filed before the Court of Appeals decides a timely filed motion for

	<p>Appeals clerk notifies the parties and the Supreme Court clerk that the Court of Appeals has denied that motion. The time for filing a response to the petition for review, or a cross-petition, is computed as if the filing of that petition occurred on the date the stay is lifted, as described in the preceding sentence.</p> <p>If the Court of Appeals grants a motion for reconsideration, the stay remains in effect until the Court of Appeals has made a final disposition. If a petition or cross-petition becomes moot because of the final disposition of a motion for reconsideration by the Court of Appeals, the petitioner or cross-petitioner must promptly file a written notice with the Supreme Court clerk to this effect.</p>	<p>reconsideration.</p> <p>(2) Duration of the Stay. The stay is lifted when the Court of Appeals clerk notifies the parties and the Supreme Court clerk that the Court of Appeals has denied the motion for reconsideration. If the Court of Appeals grants a motion for reconsideration, the stay remains in effect until the Court of Appeals enters a later disposition.</p> <p>(3) Computing Time. The time for filing a response to the petition for review, or a cross-petition, is computed as if the filing of that petition occurred on the date the stay is lifted, as described in the preceding sentence.</p> <p>(4) Mootness. If a petition or cross-petition becomes moot because of a later disposition of a motion for reconsideration by the Court of Appeals, the petitioner or cross-petitioner must promptly file a written notice of mootness with the Supreme Court clerk.</p>
23(k)	<p>Order Granting Review.</p> <p>(1) The Supreme Court clerk must promptly notify the parties and the Court of Appeals clerk if the Supreme Court grants a petition or cross-petition for review.</p> <p>(2) A Supreme Court order granting review will specify the issue or issues that the Supreme Court will review, and whether it will consider issues raised in, but not decided by, the Court of Appeals.</p> <p>(3) The Supreme Court may permit the parties to file supplemental</p>	<p>Order Granting Review.</p> <p>(1) Notice. The Supreme Court clerk must promptly notify the parties and the Court of Appeals clerk if the Supreme Court grants a petition or cross-petition for review.</p> <p>(2) Issues. A Supreme Court order granting review will specify the issue or issues that the Supreme Court will review, and whether it will consider issues raised in, but not decided by, the Court of Appeals.</p> <p>(3) Supplemental Briefs and Oral Argument. The Supreme Court may</p>

	<p>briefs, or it may set oral argument, or both. Unless otherwise ordered, oral argument may not be scheduled less than 30 days after entry of a written notice of oral argument or, if supplemental briefs are permitted, less than 30 days after the deadline for filing supplemental briefs.</p> <p>(4) If an order granting review does not provide for supplemental briefs or oral argument, any party may file a motion specifying the reasons that supplementation or oral argument, or both, would be appropriate. A party must file this motion within 15 days after the Supreme Court clerk sends notice to the parties of the order granting review.</p>	<p>permit the parties to file supplemental briefs, or it may set oral argument, or both. Unless otherwise ordered, oral argument may not be scheduled less than 30 days after entry of a written notice of oral argument or, if supplemental briefs are permitted, less than 30 days after the deadline for filing supplemental briefs.</p> <p>(4) Motion for Supplementation or Oral Argument. If an order granting review does not provide for supplemental briefs or oral argument, any party may file a motion specifying the reasons that supplementation or oral argument, or both, would be appropriate. A party must file this motion within 15 days after the Supreme Court clerk distributes notice to the parties of the order granting review.</p>
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The version appended to this Reply also includes substantive changes, as described below.

Rule 2: Definitions. Two sets of changes were made to this Rule. First, the attached version deletes the definitions of “appeal” and “party.” While these definitions might be useful in some circumstances, there are also situations where the suggested definitions might be inapplicable or confusing. For example, it is not clear how they would apply to attorney disciplinary proceedings.

Second, in parallel with the definition of “entry” of a superior court judgment, the attached version adds the following sentence to the definition of

“decision”: “‘Entry’ of an appellate court decision or order occurs when it is filed by an appellate clerk.” Adding this definition is helpful for calculating response times in appellate proceedings. For example, it would be useful in computing deadlines for filing a motion for reconsideration or a petition for review, both of which are computed under the proposed rules from the date when the Court of Appeals “enters” its decision.

Rule 4(d): Filing with an Appellate Clerk. The circumstances in which an appellate clerk may refuse to accept a filing has continued to be the subject of ongoing discussion and debate. To further address when an appellate clerk may decline an electronic submission, the attached version adds the following words shown in underline:

An appellate clerk will refuse to file a document if a required fee is not paid, or if the document fails to meet the requirements of an appellate court’s electronic filing system because the party provided incomplete or inaccurate information, or erred in completing the steps necessary to file a document.

The May 20 version further provided that a clerk may not refuse to accept a document because it does not comply with these Rules. The attached version adds to this provision the clause “or because it includes impertinent matter.” As revised, a non-compliant filing, or one containing impertinent matter, may be subject to a later court order striking the document, requiring corrective action, or imposing a sanction.

Rule 4(f): Service of All Documents Required; Manner of Service. In the May 20 version, proposed Rule 15(d) provided that if a party filed an electronic brief or appendix that included bookmarks or hyperlinks, the party was required to serve other parties with an electronic copy of the brief or appendix that contained the same functioning bookmarks or links. On further consideration, Petitioner believes that this requirement should extend to any other document, such as a motion or a petition. The attached version accordingly adds this requirement to Rule 4(f), which applies to all appellate filings, and deletes the provision that was limited to briefs, as previously contained in Rule 15(d).

Rule 6(a): Motions - Generally. In the ARCAP amendments, procedural requirements that are applicable to more than one rule are typically set forth in one rule of generally application, and then not repeated in later rules. This was not done, however, with ARCAP's service requirements, which occasionally are not followed by self-represented litigants. To reinforce the requirements that appellate filings must be served on other parties, and that a certificate of service must be filed and served, cross-references to the ARCAP's service provisions in proposed Rule 4 were added to rules associated with key filings. For example, Rule 6(a), which governs motions, contains the following new subsection:

Service. A party filing a motion, response, reply, or other document in connection with a motion must serve a copy of the filing on all parties as provided by Rule 4(f), and must file a certificate of service as provided by Rule 4(g).

Similar “reminders” are included in Rule 12(d) [service of a case management statement], Rule 15(d) [service of briefs], Rule 19(d) [service of a petition for transfer], and Rule 23(h) [service of a petition for review]. Including these provisions in rules pertaining to the most frequent filings should make it less likely that self-represented parties will overlook the ARCAP’s service requirements.

Rule 7: Stay of Proceedings to Enforce a Judgment. The originally proposed amendments to Rule 7(a) provided that the filing of a motion for a supersedeas bond stayed enforcement of the judgment. Rule 7(c) allows a party to request a stay from an appellate court. The attached version adds the words “in the superior court” to proposed Rule 7(a) to clarify that while filing a motion for a supersedeas bond in the trial court stays enforcement of the judgment, filing a similar motion in an appellate court does not.

Rule 9: Appeal and Cross-Appeal – When Taken. Proposed Rule 9(a), like the current rule, specifies that a party must file a notice of appeal within 30 days after entry of judgment, “unless the law provides a different time.” Proposed Rule 9(b) provides that a party must file a notice of cross-appeal no later than 20 days after the notice of appeal. The attached version adds to proposed Rule 9(b) the words “unless the law provides a different time” to recognize that other rules or statutes may impose a different deadline for filing a notice of cross-appeal. For

example, Rule 104(A) of the Rules of Juvenile Court requires a party to file a notice of cross-appeal within 10 days of the filing of a notice of appeal.

Rule 11: The Record on Appeal. Two changes were made to proposed Rule 11. The first change relates to cross-appellants' obligation to designate or order transcripts. To ensure that cross-appellants are subject to the same rules concerning transcripts on appeal as appellants, Rule 11(c)(6) of the May 20th version (and the attached version) specifies that the term "appellant" includes a cross-appellant. Because certain time limits in Rule 11(c) run from the filing date of a notice of appeal, the attached version further modifies this provision to add the clause "and the term 'notice of appeal' includes a notice of cross-appeal."

The second change relates to an appellate court's authority to require the record to be corrected or modified. The May 20th version added proposed Rule 11(g)(4), which would allow the appellate court to order the parties to correct an omission or misstatement in the record. Because the superior court judge may be in the best position to make such corrections, the attached version adds the phrase "or the superior court" to the proposed Rule.

Rule 13: Contents of Briefs. As originally proposed and as it appears in the attached version, proposed Rule 13(f) requires case law citations to refer to official Arizona reporters, or for non-Arizona case law, to applicable regional or federal reporters. The attached version adds the following sentence: "If a case is

not available in the official Arizona reporter, or in a regional or federal reporter, a party may provide a citation to an electronic database or another source.” This provision could be useful when a cited case is recently issued and it has not yet been included in an official Arizona, regional, or federal reporter.

Rule 13.1: Appendix. Rule 13.1(a) as originally proposed and as revised in the May 20th version, provided in part:

An electronically filed brief in Division Two of the Court of Appeals must include electronic links when citing to the record on appeal, and the brief must not include an appendix....

That language leaves unresolved what a party in Division Two must do if the party wishes to include something – such as a legislative summary or fact sheet – that is not contained within the record on appeal. The attached version addresses this issue by adding the words “or to other items” following the words “record on appeal” in the above-quoted provision, which would allow a party to include a hyperlink to such an item.

Rule 15(c): Manner of Filing Briefs. The May 20th version of Rule 15(d)(3) required a party who files a paper brief by mail or by a third-party commercial carrier to indicate in its certificate of service the date of mailing or delivery to a commercial carrier. The attached version moves this requirement to proposed Rule 15(c)(3), and it now requires a separate certificate of paper filing

indicating the manner of filing as well as the date the document was delivered to the carrier or placed in the mail.

Rule 16: Amicus Curiae. Like current Rule 16, the May 20th version of proposed Rule 16(b) refers to one who lodges or files an amicus curiae brief as an “applicant.” The use of that word, however, is not always accurate because some entities – such as the State of Arizona – have a right to file an amicus curiae brief without making an “application.” Accordingly, the attached version of Rule 16 replaces the word “applicant” with the word “person.” (Under proposed Rule 2, a “person” includes a private or public entity.)

Rule 19: Petition for Transfer. Under current Rule 19, matters that are subject to a petition to transfer are referred to both as “appeals” and “cases.” Because proposed Rule 19 intends the two words to mean the same thing, the attached version replaces the word “case” with the word “appeal” (e.g., a “party to an appeal” rather than a “party to a case.”)

Request to Amend Other Rules. Appendix 3 to the May 20 Amended Petition noted several sets of Arizona procedural rules – including the Rules of the Arizona Supreme Court, the Arizona Rules of Procedure for Special Actions, and procedural rules governing civil, criminal, family law, and juvenile actions – that refer to ARCAP rules or subparts of those rules, and which require conforming amendments if this Court adopts the proposed changes to the ARCAP. The

version of the proposed rules contained in Appendix B to this Reply requires minor alterations to the conforming changes shown in Appendix 3 to the Amended Petition. Petitioner therefore submits an updated set of conforming changes in Appendix C to this Reply. Petitioner asks, if the Court adopts Petitioner's proposed amendments to the ARCAP, that it also amend these other rules, as set out in Appendix C, to assure accurate cross-references to the ARCAP.¹

Conclusion. Petitioner believes that the most recent version of the proposed amended rules, as shown in Appendices A and B to this Reply, corrects those items in the May 20 version that required correction, clarifies those previous provisions that required clarification, and generally improves the May 20 version. Petitioner therefore requests adoption of the proposed rules set forth in Appendix B, and the conforming amendments contained in Appendix C.

Petitioner concludes by acknowledging with gratitude the many appellate judges, clerks, and staff attorneys; public and private practitioners; the State Bar; members of the superior court; and others, who offered their time and expertise to this project, and who contributed to these rules and made them better.

¹ Appendix C does not seek to amend any of the Rules of Criminal Procedure. While there are references to the appellate rules in comments to Criminal Rules 31.13 and 31.18, the rules themselves contain no references to the ARCAP, and Petitioner does not request amendment of those comments.

RESPECTFULLY SUBMITTED this 7th day of July, 2014

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